

THE TRUSTEES FOR THE TIME BEING OF THE BLESSING MUZANENHAMO TRUST
versus
EDISON WAMAMBO
and
FADZAI PATIENCE MUTASA
and
KAUMA PILO
and
HAYES ZIMBABWE (PRIVATE) LIMITED
and
RM AFRICA PROPERTY CONSULTANCY (PRIVATE) LIMITED
and
THE SHERIFF OF ZIMBABWE (N.O)

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 15 June 2022

Opposed Application

P. C. Masara, for the applicant
A. Mugiya, for 1st and 2nd respondents
Ms. Evans, for 5th respondent

TAGU J: After hearing submissions from the parties on 15 June 2021, I delivered an *ex tempore* judgment and confirmed the provisional order and granted a final order as amended. I indicated that if full reasons are required I will provide the same upon written request. Full reasons have now been requested by the first respondent and these are they.

On 2 November 2020, the High Court sitting at Harare before the Honourable Mr. Justice CHIKOWERO issued a provisional order in favour of the applicant. The matter came before me for the confirmation of the provisional order. The first and second respondents opposed the confirmation of the provisional order. The fifth respondent indicated that it was not opposed to the confirmation of the provisional order. The third, fourth and sixth respondents did not appear.

The background facts are that on 2 September 2019 applicant bought an immovable property known as a certain piece of land situate in the district of Salisbury called stand 17788 Tynwald Township of Lot 12 of Tynwald measuring 531 square metres (hereinafter referred to as 'the property' from fourth and fifth respondents for ZW\$ 300 000.00 as per agreement of sale on p 12 of the record. On 26 October 2020 applicant discovered that the first and second respondents were carrying out certain developments on the property. They had erected a wooden cabin and were digging foundations for a super structure on the property. On 2 November 2020 a provisional order was granted interdicting the first and second respondents carrying on any form of development on the property until this matter is finalized. Applicant now seeks confirmation of the provisional order.

At the hearing of this matter the applicant also sought a declarator on the basis that after the provisional order was granted, the first and second respondents continued with the building. Mr. P. C Masara applied for the amendment of the order to cater for the developments that occurred after the provisional order was granted.

The first and second respondents' basis of opposing the confirmation of the provisional order is that the second respondent never at any time sold the property in question to the applicant. That in terms of the certificate of Registered Title, the owner of the property in question is Martin Sibindi and the applicant's name does not appear thereon. As such applicant is not the holder of title in respect of the property in question. They said the second respondent bought the same property from the third respondent on 15 October 2020. To their best the property in question belonged to the third respondent owing to the agreement of sale between one Martin Sibindi and Rumbidzai Sibindi being the Sellers and the third respondent who sold the same property to the second respondent as per Annexure 'C' on 13 August 2016.

In his submissions Mr. P.C. Masara said the applicant has legal right of use and occupation of its property that emanates from an agreement of sale entered into between the applicant and fourth and fifth respondents who are the legitimate sellers of the property. He further submitted that the agreement of sale between one Martin Sibindi and third respondent which is being relied on by the first and second respondents was in respect of a subdivision of immovable property whose subdivision permit had not been issued. The subdivision permit in respect of the property in question was granted on 15 April 2019 well after Martin Sibindi and third respondent had

entered into the agreement of sale. Hence it is illegal in terms of s 39 of the Regional, Town and Country Planning Act [Chapter 29.12]. He therefore prayed that the provisional order be confirmed as amended and that the requirements for a declarator have been met.

In his response Mr. Mugiya submitted that the correct law, and authorities have been cited correctly by the applicant in respect of the declaratur and interdict but said this court has wide discretion to refuse or grant the same. He said this court need not grant a declaratur where parties are fighting in another case. He said the issue that the agreement on pp 47-59 is illegal is being raised for the first time in the heads of argument hence he could not respond to it. All he could say was that there was a valid subdivision permit but he could not produce it now. He further said to allow amendment of the order would be prejudicial to the first respondent. He was quick to say the first respondent was not relying on *lis pendens* but was merely raising an issue that there is a dispute over the property.

The court found that indeed the applicant bought the property in question from the fourth and fifth respondents who were the rightful owners of the property on 2 September 2019. He therefore has real rights over the property. The agreement of sale entered between Martin Sibindi and Rumbidzai Sibindi on one side and third respondent on the other side was entered on 13 August 2016. That agreement of sale on pp 55 to 59 of the record relates to the sale of share 100 up to 150 of the remainder of Lot 12 Tynwald Harare registered in the name of Martin Sibindi while were are talking of stand 17788. If indeed it is the same property that we are talking about, then the agreement of sale is illegal because the subdivision permit in respect of the property in question was granted on 15 April 2019 well after Martin Sibindi and third respondent had entered into the agreement of sale. This was not refuted. Mr. Mugiya said there is a valid subdivision permit but was unable to produce it.

The relevant portion of s 39 of Regional, Town and Country Planning Act [Chapter 29.12] provides as follows:

- “(1) **Subject to subsection (2), no person shall –**
- (a)....
 - (b) enter into any agreement-
 - (i) for the change of ownership of any portion of a property; or
 - (ii) ...; or
 - (iii)...; or
 - c) ...;
- Except in accordance with a permit granted in terms of section forty.”

So the first and second respondents are relying on an illegal agreement of sale which is not enforceable. Further, I found it as untruth that the validity of the agreement of sale between Martin Sibindi and third respondent was being raised for the first time in the heads of argument. At p 64 para 6 of its Answering Affidavit the applicant said among other things:

“6. It is denied that third respondent bought the property in question from Martin Sibindi. In effect, the “agreement of sale” relied upon by the first and second respondent is illegal in three respects, namely;

- (a) Firstly, the property in issue is a subdivision whose permit was granted by Harare City Council on 15 April 2019. See Annexure “F” being copy of the subdivision permit. The “agreement of sale” between the third respondent and Martin Sibindi was entered into on or about 31st August 2016. What is therefore apparent is that the third respondent “bought” the property before a subdivision permit had been granted. I am advised by applicant’s legal representative that such agreements are illegal as they fall fowl of section 39 of the Regional, Town, and Country Planning Act [*Chapter 29.12*].
- (b) Secondly the “agreement of sale” between third respondent and Martin Sibindi is in relation to Land Shares Numbers 100 to 150 while the property in issue is stand number 17788.
- (c) Martin Sibindi denies that he sold the property to third respondent. On Sunday 15 November 2020, he issued a public notice in the Sunday Mail Newspaper that there are illegal sales of vacant stands in the area where the property in question falls under. See attached hereto and marked Annexure “G” being an extract of the public notice on 15 November 2020 Sunday Mil issue. Third respondent is specifically mentioned as one of the individuals who are selling the stands illegally.”

As I said it is false that the issue of the illegality of the agreement of sale between Martin Sibindi and third respondent was raised for the first time in the heads of argument.

Having heard the submissions the court found that there was no valid opposition to the confirmation of the provisional order as well as the granting of the declarator as the first and second respondents did not dispute the fact that after an interdict was granted against them to stop any further constructions they did not do so. In fact they continued in defiance of the court order. In the result the court found that punitive costs are warranted.

IT IS ORDERED THAT

1. The provisional order granted by his Lordship Honourable Justice CHIKOWERO on 2 November 2020 be and is hereby confirmed and made a final order.
2. The agreement of sale entered into by and between the second and third respondent in respect of certain piece of land situate in the district of Salisbury called stand 17788 Tynwald Township of Lot 12 of Tynwald measuring 531 square metres be and is hereby declared null and void.
3. First to third respondents be and are hereby interdicted from interfering with applicant’s possession or occupation of the property and from otherwise causing disturbance thereto.
4. Applicant be and is hereby authorized to demolish or cause to be demolished and remove or cause to be removed, any form of development of any super structure on a certain piece of land situate

in the district of Salisbury called stand 17788 Tynwald Township of Lot 12 of Tynwald measuring 531 square metres.

5. First to third respondents shall pay the costs of this application on the legal practitioner and client scale.

TAGU J.....

V. S. Nyangulu & Associates, applicant's legal practitioners
Nyamwanza Legal Practice, first and second respondents' legal practitioners
Mabuye Zvarevashe-Evans, five respondent's legal practitioners